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RICHARD W. WILKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN JOSE DIVISION)

Law

DAVID HO, on behalf of himself and
others similarly situated and on behalf
of the general public and DOES 1-20

Plaintiff,

v.

ERNST & YOUNG, LLP

Defendant.

Case No.

C05 04867
**DEFENDANT ERNST & YOUNG
LLP'S NOTICE OF REMOVAL OF
ACTION PURSUANT TO 28 U.S.C.
§§ 1332(D)(2), 1441, 1446, AND 1453**

[DECLARATIONS OF RICHARD
KAUL, DANIEL MARTIN, AND S.
ADAM SPIEWAK IN SUPPORT OF
DEFENDANT ERNST & YOUNG
LLP'S NOTICE OF REMOVAL OF
ACTION FILED CONCURRENTLY
HEREWITH]

**(SANTA CLARA SUPERIOR
COURT CASE NO. 105CV049741)**

1 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
2 NORTHERN DISTRICT OF CALIFORNIA:

3 PLEASE TAKE NOTICE that Defendant Ernst & Young LLP ("Ernst & Young"
4 or "the Firm") hereby removes to this Court the state court action described below,
5 pursuant to 28 U.S.C. §§ 1332(d)(2), 1441, 1446, and 1453. In support thereof,
6 Defendant states as follows:

7 1. On September 27, 2005, a putative class action was commenced and is
8 currently pending against Ernst & Young LLP in the Superior Court of California,
9 County of Santa Clara, as Case No. 105CV049741, entitled DAVID HO, on behalf of
10 himself and others similarly situated and on behalf of the general public and DOES 1-
11 20, Plaintiff, vs. ERNST & YOUNG, LLP, Defendant. See Declaration of S. Adam
12 Spiewak in Support of Defendant Ernst & Young LLP's Notice of Removal of Action
13 ("Spiewak Dec."), ¶ 2. Attached as **Exhibit A** to the Spiewak Declaration is a true copy
14 of the Summons, Civil Cover Sheet, Complaint, Civil Lawsuit Notice, and Santa Clara
15 County Superior Court Alternative Dispute Resolution Information Sheet, as served on
16 Ernst & Young by facsimile on October 31, 2005. See Spiewak Dec. ¶ 3. Attached as
17 **Exhibit B** to the Spiewak Declaration is a true conformed copy of Ernst & Young
18 LLP's Answer to Plaintiff's Unverified Complaint, filed in Santa Clara Superior Court
19 on November 23, 2005. See Spiewak Dec. ¶ 4. There have been no further proceedings
20 in case number 105CV049741, and no other pleadings have been filed and served upon
21 Plaintiff or Ernst & Young in this action. See Spiewak Dec. ¶ 5.

22 2. Plaintiff is a former employee of Ernst & Young. He asserts claims for
23 failure to pay overtime wages, failure to pay wages of terminated or resigned
24 employees, and violation of the unfair competition laws. See Complaint, ¶¶ 13-21, 26-
25 28. The Complaint describes a putative class consisting of all persons employed by
26 Ernst & Young within the state of California as "Staff One," "Senior One" or "Senior
27 Two" personnel, or "similarly titled personnel who were performing the same sort of
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1 functions of the named plaintiff, and subject to the same salaried compensation system,”
2 in the four years prior to the commencement of this action who were not compensated
3 for their work and overtime work as required by California law. Id., ¶ 6.

4 3. The Complaint and Summons were first served on October 31, 2005. Ernst
5 & Young’s Notice of Removal is timely because it is filed within thirty (30) days of that
6 service. See 28 U.S.C. § 1446(b).

7 4. **Jurisdiction**. The above-described action is a civil action of which this
8 Court has original jurisdiction and thus may be removed pursuant to 28 U.S.C. §
9 1441(b). Under 28 U.S.C. § 1441(a), a defendant may remove to federal district court
10 “any civil action brought in a State court of which the district courts of the United States
11 have original jurisdiction....” Pursuant to the Class Action Fairness Act (“CAFA”),
12 Pub. L. No. 109-2 (enacted Feb. 18, 2005) (codified at 28 U.S.C. §§ 1332(d), 1453,
13 1711-1715), federal district courts have original jurisdiction over a class action if (1) it
14 involves 100 or more putative class members, (2) any class member is a citizen of a
15 state different from any defendant, and (3) the aggregated amount in controversy
16 exceeds five million dollars (exclusive of costs and interest). See 28 U.S.C. §§
17 1332(d)(2) and (d)(6).

18 5. **Class Size**. If Plaintiff’s class allegations are established, the class will
19 exceed 100 members. See Complaint, ¶¶ 5-7; Declaration of Daniel Martin in Support
20 of Defendant Ernst & Young LLP’s Notice of Removal of Action (“Martin Dec.”) ¶ 4.

21 6. **Diversity of Citizenship**. At all relevant times, there has been diversity of
22 citizenship between the parties to the action.

23 7. Ernst & Young is informed and believes that Plaintiff David Ho, at the time
24 this action was commenced, was a citizen and resident of the State of California. See
25 Complaint, ¶ 2.

26 8. Ernst & Young is not a citizen of the State of California. “[A]n
27 unincorporated association shall be deemed to be a citizen of the State where it has its
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principal place of business and the State under whose laws it is organized.” 28 U.S.C. § 1332(d)(10).¹ Ernst & Young is not organized under the laws of California. Rather, at the time this action was commenced and currently, Ernst & Young was and is a limited liability partnership organized under the laws of the State of Delaware. See Declaration of Richard Kaul in support of Defendant Ernst & Young LLP’s Notice of Removal of Action (“Kaul Dec.”) ¶ 2. Nor is California the state in which Ernst & Young has its principal place of business. Rather, as shown below, Ernst & Young’s principal place of business is located in New York.

9. In the Ninth Circuit, the “principal place of business” is determined by a two-part inquiry. First, the Court applies the “place of operations” test to determine in what state, if any, a “substantial predominance” of business activity takes place. Second, if the business’s activities are not predominant in a single state, the Court applies the “nerve center” test to identify the state in which the majority of the business’s executive and administrative functions are performed. See United Computer Systems, Inc. v. AT&T Corp., 298 F.3d 756, 763 (9th Cir. 2002). Under either test, Ernst & Young’s principal place of business is plainly not California.

10. The “place of operations” test is determinative “where a corporation conducts ‘substantially all’ of its operations in one state and its headquarters are located in another state.” Industrial Tectonics, Inc. v. Aero Alloy, 912 F.2d 1090, 1093 (9th Cir. 1990) (“courts generally assign greater importance to the corporate headquarters when no state is clearly the center of corporate activity”). Where the business has operations spread throughout the country, the “place of operations” test cannot properly identify a business’s principal place of business. See Breitman v. May Co. California,

¹ The first basis for establishing citizenship is identical for a corporation and an unincorporated association. Compare 28 U.S.C. § 1332(c)(1) (“a corporation shall be deemed to be a citizen . . . of the State where it has its principal place of business”) with § 1332(d)(10) (“an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business”).

37 F.3d 562, 564 (9th Cir. 1994); Ho v. Ikon Office Solutions, Inc., 143 F. Supp. 2d 1163, 1168 (N.D. Cal. 2001). To determine whether “substantial predominance” in a particular state exists, courts look to several factors, including the location of employees, tangible property, production activities, sources of income, and the business’s executive and administrative functions. See Tosco Corp. v. Communities for a Better Environment, 236 F.3d 495, 500-502 (9th Cir. 2001).

11. Ernst & Young’s operations clearly do not substantially predominate in California. The Firm employs approximately 25,000 individuals in forty states and the District of Columbia, including more than 4,600 individuals in New York, more than in any other state and compared to fewer than 3,000 in California. See Kaul Dec. ¶ 7.² In addition, the Firm’s executive and administrative operations are centrally managed from New York, not California. From its headquarters in New York, Ernst & Young makes and implements firm-wide operating, financial, employee relations, marketing, development, accounting, treasury, and legal policy decisions. Additionally, meetings of Ernst & Young’s Americas Executive Board regularly take place in New York. See Kaul Dec. ¶¶ 3, 5, 6. For all these reasons, if Ernst & Young’s operations substantially predominate in any one state, that state is New York.

12. If Ernst & Young’s operations are not found to substantially predominate in a single state, then the Court must apply the “nerve center” test to determine the Firm’s principal place of business. See Engels v. Exel Global Logistics, Inc., No. C 04-3944 MHP, 2005 WL 850879, *5 (N.D. Cal., April 11, 2005); Arellano v. Home Depot, U.S.A., Inc., 245 F. Supp. 2d 1102, 1106 (S.D. Cal. 2003); Ho, 143 F. Supp. 2d at 1165. Under the “nerve center” test, the principal place of business is the state where the majority of executive and administrative functions are performed. See Tosco, 236 F.3d

² A defendant may make the requisite showing by setting forth additional facts in declarations of knowledgeable company officials. See United Computer Systems, Inc. v. AT&T Corp., 298 F.3d 756, 763 (9th Cir. 2002).

1 at 500. Relevant factors include where executives reside and maintain offices, where
 2 administrative and financial offices are located, where directors meet, where income tax
 3 returns are filed, and where day-to-day control over the business is executed. See Unger
 4 v. Del E. Webb Corp., 233 F. Supp. 713, 716 (N.D. Cal. 1964), accord State Farm Fire
 5 & Casualty Co. v. Byrd, 710 F. Supp. 1292, 1293 (N.D. Cal. 1989).

6 13. Under the “nerve center” test, Ernst & Young’s principal place of business
 7 is clearly in New York. As explained above, the vast majority of the Firm’s executive
 8 and administrative functions occur in New York. For example, the executive officers of
 9 Ernst & Young, including the chairman and chief executive officer, chief financial
 10 officer, vice chair of finance and administration, vice chair and general counsel, and
 11 vice chair of people (human resources) maintain their offices at Ernst & Young’s
 12 headquarters in New York. From its headquarters in New York, the Firm manages day-
 13 to-day operations firm-wide, including determining and implementing policy regarding
 14 human resources, marketing, finance, accounting, and legal issues. See Kaul Dec. ¶¶ 3-
 15 6. In short, because Ernst & Young’s executive and administrative functions clearly are
 16 concentrated in New York, under the “nerve center test” as well, New York is Ernst &
 17 Young’s principal place of business. See Tosco, 236 F.3d at 500.

18 14. **Amount in Controversy.** Defendant avers, for purposes of this Notice
 19 only, that if Plaintiff prevailed on the claims asserted in this action, the requested
 20 monetary recovery would exceed five million dollars.³

21 15. For his Fourth Cause of Action, Plaintiff alleges that Ernst & Young owes
 22 penalties for having failed to pay wages – including the allegedly unpaid overtime pay –
 23 to employees upon the end of their employment, as required by Section 203 of the
 24 California Labor Code. See Complaint, ¶¶ 26-28. Under Section 203, former
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26 ³ A defendant may make the requisite showing by setting forth additional facts in
 27 the notice of removal or by affidavit. See Lamke v. Sunstate Equipment Co., LLC, 319
 28 F. Supp. 2d 1029, 1032 (N.D. Cal. 2004).

1 employees whom an employer willfully denied wages may recover penalties in the
2 amount of their daily rate for a period of up to thirty days. See Cal. Lab. Code § 203.

3 16. The class of former employees whom Plaintiff claims are entitled to
4 penalties under Section 203 includes at least 736 individuals who worked full-time at
5 the Staff One, Senior One, or Senior Two level since September 26, 2002. At the time
6 their employment ended, these former employees were earning an average annual salary
7 of more than \$56,000. See Martin Dec. ¶¶ 6, 7. Therefore, their average daily rate of
8 pay is more than \$215, and a 30-day penalty would exceed, on average, \$6,450 per
9 person.⁴ Accordingly, with respect to the 736 putative class members who are former
10 full-time employees, the amount of penalties in controversy exceeds \$4,747,200.

11 17. When the overtime pay claims are factored in as well, the jurisdictional
12 amount is plainly satisfied. Plaintiff's First and Second Causes of Action assert failure
13 to pay overtime compensation. See Complaint, ¶¶ 13-21. Defendant avers, for purposes
14 of this Notice only, that the putative class with respect to the overtime claims would
15 include at least 2,500 current and former employees. See Martin Dec., ¶ 4. The average
16 salary of these employees is more than \$52,000, which translates to an hourly rate of at
17 least \$25.00. See Martin Dec., ¶ 5. Therefore, the average class member would be due
18 approximately \$37.50 per overtime hour worked.⁵ If, on average, each putative class
19 member worked just three hours of overtime over the course of the entire class period,
20 the total amount of overtime compensation at issue would exceed \$280,000.

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22
23
24 ⁴ The daily rate for a full-time employee is calculated by dividing the annual
25 salary by fifty-two to ascertain a weekly salary, and then dividing that amount by five,
26 the number of days an employee typically works in a week. See, e.g., Mamika v. Barca
27 68 Cal. App. 4th 487, 492-93 (1998); see also Division of Labor Standards Enforcement
28 web page, available at: http://www.dir.ca.gov/dlse/FAQ_WaitingTimePenalty.htm.

⁵ Because overtime is compensated at a time-and-a-half rate, an employee earning
\$25.00 per hour would be compensated \$37.50 for each overtime hour worked.

18. When the penalties at issue – more than \$4,747,200 – are combined with the overtime compensation at issue, the amount in controversy clearly exceeds the \$5,000,000 threshold.

19. **Venue.** The United States District Court for the Northern District of California is the judicial district embracing the place where Case No. 105CV049741 was filed by Plaintiff and is therefore the appropriate court for removal pursuant to 28 U.S.C. § 1441(a).

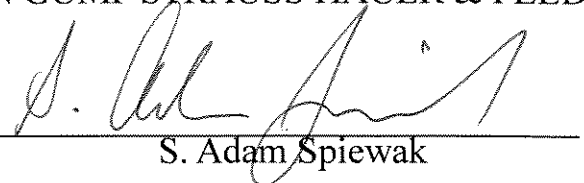
20. There are no grounds that would justify this Court in declining to exercise its jurisdiction pursuant to 28 U.S.C. §§ 1332(d)(3) or requiring it to decline to exercise jurisdiction pursuant to 28 U.S.C. §§ 1332(d)(4).

WHEREFORE, Ernst & Young LLP requests that the above action now pending against it in the Superior Court of California, County of Santa Clara, be removed therefrom to this Court.

Dated: November 28, 2005

AKIN GUMP STRAUSS HAUSER & FELD LLP

By


S. Adam Spiewak

Attorneys for Defendant Ernst & Young LLP